Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

JMC TELECOM, LLC,

Petitioner,

v.

AT&T CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The United States District Court for the District of New Jersey entered an antisuit injunction prohibiting petitioner JMC Telecom, LLC from pursuing its antitrust complaint against respondent AT&T Corp. in the United States District Court for the Eastern District of New York, even though the parties' contract required JMC to sue AT&T only in New York. The Third Circuit Court of Appeals held that it lacked jurisdiction to hear JMC's appeal of the injunction and then denied JMC's Petition for a Writ of Mandamus which was filed in the alternative.

1. Did the Third Circuit err when it relied upon *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272 (3d Cir. 1991), a case which conflicts with controlling decisions of the Supreme Court and other United States Courts of Appeals, in holding that it lacked appellate jurisdiction under 28 U.S.C. § 1292(a)(1) to hear JMC's appeal of an injunction entered by the United States District Court for the District of New Jersey which prohibits JMC from proceeding with its antitrust lawsuit against AT&T in the United States District Court for the Eastern District of New York?

2. Does the Third Circuit's decision conflict with the Supreme Court's decision in *Aluminum Co. of America v. United States*, 302 U.S. 230 (1937), which requires an identity of issues in two cases before an injunction may be issued prohibiting a second-filed antitrust case from proceeding?

3. Will the Third Circuit's decision, and the district court's orders, so serve to undermine the strong judicial policy favoring the settlement of disputes that a writ of certiorari should issue to permit the Supreme Court to exercise its supervisory power over the federal courts?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, JMC Telecom, LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinions and orders in this case have not been reported. The Memorandum Opinion and Judgment of the court of appeals appear in Appendix ["App."] A to this petition and the Order Denying Petition for Rehearing appears in App. D (p. 46a). The Memoranda and Orders of the district court dated March 17, 2000 and January 21, 2000, appear in App. B (p. 17a) and C (p. 34a), respectively.

BASIS FOR JURISDICTION IN THE SUPREME COURT

The date of the judgment or order sought to be reviewed is January 23, 2001. App. A. The date of the court of appeals' order denying rehearing is March 13, 2001. App. D. The statutory provision believed to confer jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is 28 U.S.C. § 1292(a)(1). It provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> > (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the

> judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[.]

JURISDICTIONAL BASIS IN THE DISTRICT COURT

The basis for jurisdiction in the district court is 28 U.S.C. §§ 1332(a) and (c) (diversity jurisdiction) and 28 U.S.C. § 1331 (claims arising under the laws of the United States).

STATEMENT OF THE CASE

On June 4, 1999, without forewarning, and while the parties' counsel were engaged in settlement talks in New York City, AT&T Corp. ["AT&T"] filed a collection action in the United States District Court for the District of New Jersey against petitioner JMC Telecom, LLC ["JMC"].

On June 29, 1999, JMC filed its own complaint in the United States District Court for the Eastern District of New York. JMC filed in New York because a one-way forum selection clause drafted and imposed on JMC by AT&T required that any suit against AT&T by JMC be filed only in New York. JMC's complaint alleged violations by AT&T of the antitrust laws, New York's Unfair Competition statutes, the federal Telecommunications Act, breach of contract, fraud and interference with prospective business advantage.

On October 15, 1999, JMC moved the district court in New Jersey to dismiss or transfer AT&T's complaint to the

eastern district of New York. That motion was denied on January 21, 2000. App. C (p. 34a).

On February 2, 2000, JMC moved before the district court in New Jersey: (1) to certify its January 21, 2000 order for appeal pursuant to 28 U.S.C. § 1292(b); and (2) for reargument based on overlooked facts and law. JMC also moved to dismiss for lack of personal jurisdiction, in part, because the averment in AT&T's complaint that "JMC resides in, is found in, transacts business in and is subject to personal jurisdiction" in New Jersey, is untrue.

On February 8, 2000, AT&T moved before the district court in New Jersey to enjoin JMC from prosecuting its antitrust action in New York based on the first-filed rule. JMC opposed AT&T's motion.

On March 8, 2000, the district court in New Jersey heard oral argument on JMC's motions for reargument, for certification under 28 U.S.C. § 1292(b) and to dismiss for lack of personal jurisdiction, and on AT&T's motion to enjoin JMC from prosecuting its complaint in the eastern district of New York.

In the meantime, the district court in New York had ordered discovery to commence in JMC's case. While the parties were actually present in the district court in New York for a hearing on March 17, 2000, the district court in New Jersey issued its order granting AT&T's motion to enjoin JMC from taking further action in the New York case and denying JMC's motions. App. B (p. 17a).

On March 29, 2000, JMC filed a motion to stay the New Jersey district court case pending appeal pursuant to

Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a)(1)(C). The district court entered an order staying proceedings *sua sponte* in the exercise of its inherent authority to control its docket.

On April 14, 2000, JMC filed a Notice of Appeal in the district court appealing the issuance of the injunction. On April 17, 2000, JMC also filed a Petition for Writ of Mandamus and/or Writ of Prohibition in the Third Circuit Court of Appeals.[1]

The case was argued before the court of appeals on August 11, 2000. On January 23, 2001, the Court of Appeals dismissed the appeal for lack of appellate jurisdiction, relying on *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272 (3d Cir. 1991), and then denied JMC's Petition for a Writ of Mandamus and/or Writ of Prohibition.

On February 6, 2001, JMC filed a Petition for Panel Rehearing and Suggestion for Rehearing En Banc. On March 13, 2001, the court of appeals issued an order denying the petition for rehearing.

JMC now files this Petition for a Writ of Certiorari.

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1. The petition was filed as a precautionary measure because of the decision by the Third Circuit in *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272 (3d Cir. 1991), which has created uncertainty in the Third Circuit about the appealability of injunctions of the type issued by the New Jersey district court in this case. It is the *Hershey* case which JMC seeks by this Petition for a Writ of Certiorari to have the Supreme Court review and overrule.

STATEMENT OF FACTS

At the time AT&T filed its complaint against JMC in the district court in New Jersey, AT&T knew that if the settlement talks which were then taking place failed, JMC intended to file a complaint in federal court in New York alleging, among other things, that AT&T had violated the antitrust laws. AT&T knew this because JMC had so informed AT&T, and even sent AT&T evidence to support its claims. In addition, AT&T had imposed a one-way forum selection clause in the parties' contract requiring JMC to sue AT&T only in New York. In fact, it was JMC's stated intention to sue that prompted AT&T to engage in settlement talks in the first place. However, while the talks were ongoing, AT&T, without forewarning, and in an obvious effort to beat JMC to the courthouse, filed a collection action against JMC in the federal district court in New Jersey. Shortly thereafter, JMC filed its complaint against AT&T in the United States District Court for the Eastern District of New York.

Even though the district judge in New Jersey agreed that JMC had been "sandbagged" by AT&T's race to the courthouse while settlement talks were ongoing, and although the forum selection clause required JMC to sue AT&T only in New York, the district judge granted AT&T's motion for an injunction prohibiting JMC from pursuing its lawsuit in the eastern district of New York.

JMC took an appeal from the district court's injunction under 28 U.S.C. § 1292(a)(1) which by it terms grants an automatic right of appeal to the courts of appeals from grants of injunctions and, at the same time, filed a Petition for a Writ of Mandamus and/or Writ of Prohibition because of

the Third Circuit's decision in *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272 (3d Cir. 1991) which, alone among the circuits, limits the right of appeal conferred by 28 U.S.C. § 1292(a)(1).

The court of appeals, in reliance on *Hershey*, erroneously dismissed JMC's appeal for lack of appellate jurisdiction. The court then turned to JMC's Petition for Writ of Mandamus and/or Writ of Prohibition and denied JMC's petition under the very stringent rules that apply to petitions for extraordinary writs.

REASONS FOR GRANTING THE WRIT

JMC now petitions the Supreme Court to issue a writ of certiorari to the Third Circuit Court of Appeals in order to review and overrule *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272 (3d Cir. 1991) because it violates 28 U.S.C. § 1292(a)(1), and conflicts with controlling decisions of the United States Supreme Court and the authoritative decisions of the other circuits on the same matter. Once *Hershey* is overruled, it will necessarily follow that the circuit court's dismissal of JMC's appeal for lack of appellate jurisdiction be reversed. The Supreme Court should then either review JMC's appeal of the injunction on the merits and reverse the decision of the New Jersey district court enjoining JMC from proceeding with its case in the eastern district of New York, or remand that issue to the court of appeals to review on appeal rather than as the subject of a petition for mandamus and/or prohibition.

In addition to the need to overrule the *Hershey* decision in order to bring the Third Circuit into conformity with 28 U.S.C. § 1292(a)(1), Supreme Court precedent and the

decisions of the other circuit courts relative to the right to immediately appeal the issuance of injunctions, a writ of certiorari should be granted, as an exercise of the Supreme Court's supervisory power over the federal courts, to vindicate the strong judicial policy favoring the settlement of disputes which the decisions of the district and circuit courts will otherwise serve to undermine.

I. The Third Circuit Erred When It Relied Upon *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272 (3d Cir. 1991), Which Violates 28 U.S.C. § 1292(a)(1) And Is Contrary To Controlling Decisions Of The Supreme Court And The Authoritative Decisions Of Other United States Courts Of Appeals, In Holding That It Lacked Appellate Jurisdiction To Hear JMC's Appeal.

In its Memorandum Opinion (App. A), at p. 5a, the Court of Appeals said it was dismissing JMC's appeal because "[u]nder *Hershey Foods*, . . . the March 17 Order enjoining JMC from prosecuting the action in the Eastern District of New York neither grants nor denies any part of the substantive relief sought by AT&T in its complaint filed in the New Jersey District." This holding, which is based on *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272 (3d Cir. 1991), is contrary to the clear wording of 28 U.S.C. § 1292(a)(1), controlling decisions of the Supreme Court and the authoritative decisions of other circuit courts which have spoken on the issue.

28 U.S.C. § 1292(a)(1) says categorically that "the court of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof,

> granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[.]

In *MAI Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978 (10th Cir. 1992), the appellee moved to dismiss the appeal on the grounds that the antisuit injunction issued by the district court in that case was not an appealable interlocutory injunction under 28 U.S.C. § 1292(a)(1). The appellee in *MAI* relied on *Hershey*. In refusing to dismiss the appeal, the Tenth Circuit carefully analyzed *Hershey*, pointing out its defects and rejecting its holding. *MAI*, *supra* at 980-83. In so doing, the court noted that "certain orders are so clearly 'injunctions' within the meaning of the statute that no further inquiry is necessary." *Id.* at 981. The Tenth Circuit cited the Supreme Court's decision in *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 182 (1955) [*overruled on other grounds*, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988)], in support of its holding that " 'an interlocutory order expressly granting or denying injunctive relief fits squarely within the plain language of section 1292(a)(1).' " *MAI Basic Four*, *supra* at 981 [other citation omitted]. The court went on to say that:

> Since [the Supreme Court's decision in] *Bodinger*, the courts of appeals have generally adopted a *per se* rule for dealing with orders like the instant one, holding that an "order that prohibits a party from pursuing litigation in another court is unquestionably an injunction for purposes of interlocutory appeal under 28 U.S.C.A. 1292 (a)(1)." *Id.* [*quoting* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, 3923, at 48 (1977)].

With the exception of the Third Circuit, the other circuit courts which have weighed in on the issue, have uniformly adhered to the rule that an antisuit injunction is appealable as of right under § 1292(a)(1). Indeed, *Hershey* was singled out for criticism by one commentator in a review of the very question in issue here:

> Although the [*Hershey*] opinion is carefully constructed, the result should be rejected. Adherence to this opinion will lead to yet another quagmire of jurisdictional lore, requiring determination of the circumstances in which an antisuit injunction involves relief on the merits. 16 Wright, Miller, Cooper & Gressman, *supra* at 48 n.1.

After reaffirming the rule that an antisuit injunction is *per se* appealable under § 1292(a)(1), the *MAI* court went on to examine what it described as a "second line of analysis" which has developed under § 1292(a). This is the analysis apparently erroneously employed by the Third Circuit in this case and in *Hershey*. The second line analysis holds that " 'orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not . . . "interlocutory" within the meaning of 1292(a)(1).' " *MAI*, *supra* at 981, *quoting Switzerland Cheese Ass'n v. E. Horne's Market*, 385 U.S. 23, 25 (1966). At page 5a of the Memorandum Opinion (App. A), the Third Circuit cites *Switzerland Cheese* as the underlying basis for its decision in *Hershey* and in this case. But *Switzerland Cheese*, and the second line analysis it describes, are inapplicable because, as the Tenth Circuit held, "[t]he former [*per se*] strand applies to orders ruling on *express motions for injunctive relief*, whereas the latter [second line analysis] applies only to orders that have

'the practical effect' of granting or refusing an injunction." *MAI*, *supra* at 982 [emphasis added; citation omitted]. In this case, there is no question that AT&T moved in the New Jersey district court specifically for an antisuit injunction and *an injunction was issued.*[2] This should have triggered JMC's *per se* right to appeal under § 1292(a)(1) and foreclosed the *Hershey* kind of analysis which asks whether the order grants or denies substantive relief demanded in AT&T's complaint.

The *Hershey* decision also conflicts with the decisions of the Second Circuit in *HBE Leasing Corporation v. Frank*, 48 F.3d 623 (2d Cir. 1995) and *Klein v. Adams & Peck*, 436 F.2d 337 (2d Cir. 1971). In *HBE Leasing*, the Second Circuit used the second line analysis in concluding that a party who had been ordered by the district court to remove liens from property could take an immediate appeal under § 1292(a)(1) because the order was "designed to accord the substantive relief sought." *Id.* at 632. In a footnote, the court noted that "the order is effectively an injunction against suit in another court" and is, therefore, " 'unquestionably an injunction for purposes of interlocutory appeal. . . .' " *Id.* at 632 n.6 [*quoting*, 16 Wright, *supra*, § 3923, at 48; and *citing*, *FDIC v. Geldermann, Inc.*, 975 F.2d 695, 697 (10th Cir. 1992); *Phillips v. Charles Schreiner Bank*, 894 F.2d 127, 130 (5th Cir. 1990); and *Klein v. Adams & Peck*, *supra*]. The court went on to cite *Hershey* as the exception to the general rule.

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2. The district court's Memorandum and Order of March 17, 2000, describes what transpired: AT&T filed "a motion . . . to enjoin defendant from prosecuting its action pending in the United States District Court for the Eastern District of New York[,]" and "ORDERED that defendant is ENJOINED from prosecuting its action in the United States District Court for the Eastern District of New York."

In the *Klein* case, the Second Circuit held, without qualification, that "[b]ecause [the judge's] directive is an injunction which unconditionally bars plaintiffs from proceeding in his other actions, that order is a decision from which appeal may be taken." *Klein v. Adams & Peck, supra* at 339.[3]

As Wright & Miller accurately predicted, *Hershey* has now resulted in a "quagmire of jurisdictional lore" that has led the court of appeals in this case to answer the following question in a way which is both illogical and contrary to the clear and unambiguous mandate of 28 U.S.C. § 1292(a)(1) that the grant of an injunction is immediately appealable. The court of appeals:

> In particular, the question before this Court is ***whether the . . . decision to enjoin JMC*** from prosecuting its action in the Eastern District of New York ***constitutes an "injunction"*** for purposes of § 1292 (a)(1). App. A, p.4a [emphasis added].

The court of appeals has essentially said "no", in this case an injunction is not an injunction.

In sum, *Hershey* appears to conflict with all other circuits on this point. *See also Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1461 (Fed. Cir. 1990) [grant of injunction against suit

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3. The irony attending the conflict between the Second and Third Circuits on this issue is apparent. Had the proceedings been reversed, and had JMC moved successfully in the eastern district of New York to enjoin AT&T from prosecuting its action in the district court in New Jersey, AT&T would have been entitled to take an immediate appeal to the Second Circuit.

in another forum is appealable as of right under § 1292(a)(1)]; *Asset Allocation & Mgt. Co. v. Western Employers Ins. Co.*, 892 F.2d 566, 568 (7th Cir. 1989) [injunction requiring defendant to dismiss action in another court because it was a compulsory counterclaim in first action was an appealable interlocutory order under § 1292(a)(1)]; *Seattle Totems Hockey Club v. National Hockey League*, 652 F.2d 852, 853 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 [injunction against foreign action that should have been compulsory counterclaim in federal court action appealable under § 1292(a)(1)]; *Mellon Bank, N.A. v. Pritchard-Keang Nam Corp.*, 651 F.2d 1244, 1247 (8th Cir. 1981) [order prohibiting party from pursuing litigation in another court is unquestionably an injunction for purpose of interlocutory appeal]. *See also Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899 (5th Cir. 1975); *Ellicott Mach. Corp. v. Modern Welding Co.*, 502 F.2d 178, 180 n.1 (4th Cir. 1974); and *Guy v. Citizens Fid. Bank & Trust Co.*, 429 F.2d 828, 831 (6th Cir. 1970).

II. The Third Circuit's Decision Is Contrary To *Aluminum Co. Of America v. United States*, 302 U.S. 230 (1937), which requires an identity of issues in two cases before an injunction may be issued prohibiting a second-filed antitrust case from proceeding.

The decision of the court of appeals holds that, although "the first-filed rule . . . allows a court to enjoin the subsequent prosecution of proceedings involving the same parties and the *same issues* already before another district court" (App. A, p. 10a [emphasis added]), it does not require an *identity* of issues. None of the cases cited by the court of appeals are antitrust cases and the court did not refer to *Aluminum Co. of America v. United States*, 302 U.S. 230 (1937), which JMC cited in support of its argument, that an

identity of issues and parties is essential before an antitrust case may be enjoined under the first-filed rule. In *Aluminum Co.* the Supreme Court said, "[p]lainly, . . . appellant cannot succeed unless the Pennsylvania and New York suits are *substantially identical in subject matter and issues.*" *Id.* at 232 [emphasis added]. Since the two suits were "dissimilar in respect of parties defendant, subject matter, issues and relief sought" an injunction could not issue. *Id.* This requirement of substantial identity, which the Supreme Court applied in the antitrust context, is different than the substantial overlap rule relied on by the Third Circuit. The stricter substantial identity requirement is also consistent with the district court's decision in *Columbia Pictures Indus., Inc. v. Schneider*, 435 F. Supp. 742 (S.D.N.Y. 1977) where the court said it is important to afford antitrust plaintiffs their choice of forum. A cursory review of AT&T's collection complaint and JMC's antitrust complaint reveals that the issues in the two cases are far from being "substantially identical."

The decision by the court of appeals is contrary to the Supreme Court's decision in *Aluminum Co. of America v. United States*, warranting review by the Supreme Court.

III. The Decision By The Court of Appeals Will So Undermine The Strong Judicial Policy Favoring The Settlement Of Disputes That A Writ Of Certiorari Should Issue To Permit The Supreme Court To Exercise Its Supervisory Power Over The Federal Courts.

Generally, the first-filed rule will require a court to preserve the complaint brought first and dismiss, transfer, stay or enjoin prosecution of the complaint filed second. Although there are numerous exceptions to the first-filed rule, the court of appeals refused to recognize an exception to the rule to allow JMC's case to continue in New York. The court's decision will have the effect of discouraging parties from attempting to settle their differences for fear that they will be lulled by a false security and then, without warning, be beaten to the courthouse door. Instead, there will be every incentive for a party to "shoot first and ask questions later." As one federal court has said:

> I believe that a litigant, whether a swift first or as a prompt retaliator, is open to the charge of forum shopping whenever he chooses a forum with slight connection to the circumstances surrounding his suit. Litigants should be encouraged to attempt to settle their differences without imposing undue expense and vexatious situations on the courts. *Rayco Manufacturing Company v. Chicopee Manufacturing Company*, 148 F. Supp. 588, 593 (S.D.N.Y. 1957).

The parties' connection to the New Jersey forum is, at best, slight. JMC and AT&T do business in New York. JMC sold AT&T's prepaid phone cards in New York. JMC

does not do business in New Jersey. AT&T is a New York corporation with offices in New York. New Jersey's only connection to this litigation is that AT&T has offices there.

Both parties intended by the forum selection clause, which was drafted and imposed on JMC by AT&T, that AT&T could be sued only in New York. Indeed, even the district judge in New Jersey agreed that JMC was "sandbagged" when AT&T furtively filed its complaint in New Jersey. The only plausible view is that AT&T engaged in forum shopping. It filed in New Jersey solely to preempt JMC's filing in New York, which it knew to be imminent if settlement talks failed. "Bad faith . . . and forum shopping have always been regarded as proper bases for departing from the [first-filed] rule." *E.E.O.C. v. University of Pennsylvania*, 850 F.2d 969, 976 (3d Cir. 1988) [citations omitted]. One of the primary purposes of the first-filed rule is "to avoid burdening the federal judiciary." *Id.* Allowing a party to entice another into settlement discussions in order to beat him to court will discourage settlement and defeat this primary purpose. Although a district judge has discretion in the matter, the court is "bound to acknowledge these principles" and to "act with regard to what is right and equitable under the circumstances and the law." *Id.* [citations and internal quotation marks omitted.]

There is nothing plausible in the record to suggest that AT&T filed in New Jersey for any reason other than to shop the forum. The exception to the first-filed rule therefore applies and although a district court has discretion in such cases, its "discretion is not to be equated with judicial license to decide by fiat[.]" *Mattel, Inc. v. Louis Marx & Co., Inc.*, 353 F.2d 421, 424 (2d Cir. 1965). When one considers what AT&T did while JMC was trying in good faith to negotiate a settlement, it was an abuse of discretion for the district court to grant AT&T's request for an injunction to halt JMC's New York action.

Unless the Supreme Court issues a writ of certiorari and reviews and reverses the decision of the court of appeals and the orders of the district court granting the injunction and denying JMC's motion to dismiss or transfer AT&T's complaint to the eastern district of New York, the strong judicial policy favoring settlement of disputes and avoidance of unnecessary litigation will be seriously undermined. The Supreme Court should, we respectfully submit, issue a writ of certiorari in the exercise of its supervisory power over the federal courts in order to vindicate this important judicial policy. Alternatively, the Supreme Court should issue the writ and reverse and remand this case to the court of appeals to review the district court's orders on appeal, rather than under the stricter standards which apply to extraordinary writs.[4]

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4. The court of appeals, having decided that *Hershey* prevented JMC from taking an appeal, reviewed the district court's decisions under the much more rigorous rules pertaining to petitions for mandamus. *See, e.g., In re Chambers Dev. Co.*, 148 F.3d 214, 223 (3d Cir. 1998) [writ of mandamus used to confine inferior court to lawful exercise of its jurisdiction; and writ is a drastic remedy whose use is discouraged; writ only to be used in response to "judicial usurpation of power"; petitioner must show he has no other means to attain desired relief and his right to writ is "clear and indisputable"]. If *Hershey* is overruled, as JMC believes it should be, review of the district court's injunction will be by appeal, where the less stringent abuse of discretion standard will apply. *E.E.O.C. v. University of Pennsylvania*, 850 F.2d 969, 972 (3d Cir. 1988).

CONCLUSION

Petitioner JMC respectfully requests that this Court issue a writ of certiorari to the Court of Appeals for the Third Circuit and review these important questions of federal law in order to correct the decisions of the lower courts which conflict with controlling Supreme Court precedent and the authoritative decisions of the other circuit courts of appeals which have dealt with these issues, and to vindicate the judicial policy favoring the settlement of disputes.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JANUARY 23, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-5247

IN RE:
JMC TELECOM, LLC,

Petitioner

No. 00-5279

AT&T CORP.

v.

JMC TELECOM, LLC

Appellant

On Petition for a Writ of Mandamus to and
on Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 99-cv-02578)
District Judge: Honorable Mary Little Cooper.

Appendix A

Argued August 11, 2000

Before: BARRY, AMBRO, and GREENBERG,
Circuit Judges

(Opinion filed: January 23, 2001)

MEMORANDUM OPINION

AMBRO, *Circuit Judge*

This case raises two questions. First, we must address whether this Court has jurisdiction to review the New Jersey District Court's March 17, 2000 Order granting the motion of AT&T Corp. ("AT&T") to enjoin JMC Telecom, LLC ("JMC") from prosecuting its action pending in the Eastern District of New York. Second, we must decide whether to grant JMC's Petition for Writ of Mandamus to review the New Jersey District Court's January 21, 2000 and March 17, 2000 Orders (to the extent they are not reviewable on appeal pursuant to 28 U.S.C. § 1292(a)(1)). We answer both of these questions in the negative.

I.

AT&T and JMC entered into an agreement (the "Agreement") whereby AT&T would provide its commercial prepaid telephone calling card service to JMC, and JMC would sell prepaid phone card services to end users. The contractual documents set forth the applicable rates, terms and conditions governing the provision of commercial prepaid card service to JMC. The Agreement committed JMC

to design and print prepaid phone cards and for AT&T to fund, in part, the production of the cards. An addendum to the Agreement stated, among other things, that if a business downturn beyond JMC's control resulted in JMC's inability to meet its revenue or volume commitments, the parties would cooperate in efforts to develop a mutually agreeable solution, which could include a change in rates.

JMC subsequently developed concerns with the card service provided by AT&T and was unable to resolve its disputes with AT&T consensually. As a result, on June 4, 1999, AT&T filed a complaint against JMC in the New Jersey District Court alleging that JMC owed AT&T $1.9 million for breach of contract. On June 29, 1999, JMC filed a complaint against AT&T in the Eastern District of New York alleging claims for breach of contract, violations of antitrust laws, violations of federal communications laws, unfair competition, fraud, conspiracy, and interference with prospective business advantage.

On December 7, 1999, JMC filed a motion to dismiss or, in the alternative, to transfer the New Jersey District action for improper venue pursuant to 28 U.S.C. § 1406(a). The New Jersey District Court denied the motion on January 21, 2000. Thereafter, JMC filed a series of motions in the New Jersey District Court: (i) for reconsideration of the January 21 Order; (ii) for certification for immediate appeal of the January 21 Order; and (iii) to dismiss for lack of personal jurisdiction. In turn, AT&T filed a motion to enjoin JMC from prosecuting the action initiated by JMC in the Eastern District of New York. In a March 17, 2000 opinion, the New Jersey District Court denied all of JMC's motions

and enjoined JMC from prosecuting its action in the Eastern District of New York.

On April 13, 2000, JMC filed a timely notice of appeal of the March 17 Order. In its notice of appeal, JMC also requested that this Court exercise its power to review the January 21 Order, which the New Jersey District Court had failed to certify for interlocutory review. On April 17, 2000, JMC filed a Petition for Writ of Mandamus seeking review of the New Jersey District Court's January 21 and March 17 Orders. In its May 5 Order, the New Jersey District Court stayed its proceedings pending this appeal.

II.

Under 28 U.S.C. § 1291, we have jurisdiction over appeals of "final decisions" of district courts. Even if a decision is not final, however, we have jurisdiction in limited circumstances under 28 U.S.C. § 1292. In particular, under § 1292(a)(1), we have appellate jurisdiction over appeals from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ."

Here, the parties dispute whether the March 17 Order may be appealed under 28 U.S.C. § 1292(a)(1). In particular, the question before this Court is whether the New Jersey District Court's decision to enjoin JMC from prosecuting its action in the Eastern District of New York constitutes an "injunction" for purposes of § 1292(a)(1).

In *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272, 1277 (3d Cir. 1991), we held that an order is not

an "injunction" for purposes of § 1292(a)(1) unless it grants some or all of the substantive relief sought by the claimant. In that case Hershey Foods Corp. ("Foods") and Hershey Creamery Co. ("Creamery") filed actions against each other, relating to the same subject matter, in the Middle District of Pennsylvania and the Southern District of New York, respectively. After Creamery moved to transfer the Middle District of Pennsylvania action to the Southern District of New York, Foods moved in the Middle District of Pennsylvania for an order enjoining Creamery from further proceedings in the Southern District. When the Middle District denied Creamery's motion to transfer and granted Foods' motion to enjoin Creamery, Creamery sought appellate review. Because the Middle District's order enjoining Creamery from proceeding in the Southern District did not grant part of the substantive relief requested by Foods, we found that we lacked appellate jurisdiction to review the Middle District's order. *See id.* at 1278; *see also Switzerland Cheese Ass'n v. E. Home's Market, Inc.*, 385 U.S. 23, 25 (1966) ("Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1).").

Under *Hershey Foods*, we must dismiss JMC's appeal for lack of appellate jurisdiction because the March 17 Order enjoining JMC from prosecuting the action in the Eastern District of New York neither grants nor denies any part of the substantive relief sought by AT&T in its complaint filed in the New Jersey District. As was the case in *Hershey Foods*, the New Jersey District Court's order here resolves only a procedural issue — which court will hear the underlying dispute.

In order to avoid this result, JMC first argues that we should decline to follow *Hershey Foods* because the issues in the New Jersey District action (*i.e.*, primarily a collection action) are not the same as the issues in the New York Eastern District action (among other things, an antitrust action), whereas the parties in *Hershey Foods* were litigating the same issues in different federal courts. We find this argument unpersuasive because both actions arise out of the same contractual documents and the same course of conduct.[1] Indeed, the New Jersey District Court concluded that (i) there was sufficient overlap between the parties' complaints, and (ii) the existence of simultaneous suits would likely result in a duplication of judicial work and could expose the parties to inconsistent results. Moreover, JMC itself acknowledged the significant overlap between the complaints. In its Memorandum in Support of its Motion to Dismiss filed in the New Jersey District Court, JMC stated: "The facts underlying both the AT&T and JMC complaints arise out of, inter alia, the contract signed by the parties, the conduct of the parties vis á vis that contract, and the general market conditions. . . . There is no sensible reason for litigating these two complaints in separate forums. They should be tried together."

Next, JMC argues that even under *Hershey Foods* the New Jersey District Court's March 17 Order is appealable because "the injunction effectively cuts JMC off from prosecuting its antitrust claims entirely" and therefore the injunction directly affects the relief sought by JMC in its complaint. JMC's argument turns on its interpretation of the

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1. The Court's decision in *Hershey Foods* did not require an identity of issues or parties for application of the rule set forth therein.

forum selection provision in the Agreement, which provides in pertinent part:

> The construction, interpretation and performance of this Agreement and all transactions under it shall be governed by the laws of the State of New York excluding its choice of law rules. [JMC] agrees not to file any action, claim, suit or demand, including any claim for injunctive, legal or other equitable relief against [AT&T], in any court of any jurisdiction apart from the state or federal court, located in New York . . . .

In short, JMC argues that because of this provision it is prevented from asserting any claims against AT&T except in New York, even if those claims are asserted as counterclaims.

Again, JMC's argument is not persuasive. First, AT&T has waived application of the forum selection provision to the extent that it even applies. *See Respondent's Answer to Defendant's Petition for Writ of Mandamus*, at 12 n.10 ("AT&T has expressly waived any argument that JMC may not bring [its claims in the Eastern District's action] in this case because of the [Agreement's] forum selection clause."). Moreover, the New Jersey District Judge fully expected that JMC would bring the claims raised in the New York Eastern District action in the New Jersey District. *See Transcript of Telephone Conference*, at 20 (January 18, 2000) ("[A]ll of those [antitrust] issues can be joined here and we'll deal with it.").

In sum, because the March 17 Order enjoining JMC from prosecuting the action in the Eastern District of New York neither grants nor denies any part of the substantive relief sought by AT&T in its complaint filed in the District of New Jersey, *Hershey Foods* requires that we dismiss JMC's claim for lack of appellate jurisdiction.

III.

JMC next argues that if the January 21 and March 17 orders were not reviewable under § 1292(a)(1), we should grant its Petition for Writ of Mandamus to review these orders. It claims that the New Jersey District Court erred in two ways: (i) by enjoining JMC from prosecuting its Eastern District of New York action, and (ii) by refusing to transfer AT&T's case from the New Jersey District to the Eastern District. We decline to follow JMC's reasoning and deny its Petition for Writ of Mandamus.

"Traditionally, the writ of mandamus has been used 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *In re Chambers Dev. Co.*, 148 F.3d 214, 223 (3d Cir. 1998) (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978)). "The writ is a drastic remedy that 'is seldom issued and its use is discouraged.' " *Id.* (quoting *Lusardi v. Lechner*, 855 F.2d 1062, 1069 (3d Cir. 1988)). The writ of mandamus should only be granted "in response to an act amounting to a judicial usurpation of power." *Id.* (quoting *Hahnemann Univ. Hosp. v. Edgar*, 74 F.3d 456, 462 (3d Cir. 1996)).

Appendix A

There are two prerequisites for issuance of a mandamus writ: " '(1) that petitioner have no other adequate means to attain the desired relief, and (2) that petitioner meets its burden of showing that its right to the writ is clear and indisputable.' " *Id.* (quoting *Hahnemann Univ. Hosp.*, 74 F.3d at 462). JMC has the burden of proving these two prerequisites. *See Mallard v. United States Dist. Ct.*, 490 U.S. 296 (1989).

As to the first prong, where there are practical avenues for seeking relief that are untried, this Court will ordinarily deny a petition for mandamus. *See Hahnemann Univ. Hosp.*, 74 F.3d at 461 ("[W]here interlocutory appeal seems a practical but untried avenue, we will ordinarily deny a petition for mandamus."). However, formal exhaustion of futile remedies is not required. *See id.* at 462 (granting mandamus despite petitioner's failure to make a formal application for certification of an interlocutory appeal where an informal application had been made and not granted).

As to the second prong, where a court commits a clear error of law, a right to relief is clear and indisputable. *See Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 861 (3d Cir. 1994). Moreover, mandamus can apply to discretionary acts where petitioners can demonstrate a "clear abuse of discretion." *Mallard*, 490 U.S. at 309. "Even when these prerequisites are met, issuance of the writ is largely discretionary . . . ." *In re Chambers Dev. Co.*, 148 F.3d at 223. "[I]t is within a court's discretion to refrain from issuing the writ even when the requirements for mandamus are technically satisfied. The availability of the writ 'does not compel its exercise.' " *Id.* (quoting *Lusardi*, 855 F.2d at 1070).

Here, JMC has failed to demonstrate either a clear error of law or an abuse of discretion. As a consequence, its mandamus petition must be denied.

A.

The New Jersey District Court enjoined JMC from prosecuting its action in the Eastern District of New York under the first-filed rule, which allows a court to enjoin the subsequent prosecution of proceedings involving the same parties and the same issues already before another district court. *See EEOC v. University of Penn.*, 850 F.2d 969, 971 (3d Cir. 1988); *Triangle Conduit & Cable Co. v. National Elec. Prods. Corp.*, 125 F.2d 1008, 1009 (3d Cir. 1942). Application of the rule, however, does not require that the issues in the two cases be identical. *See, e.g., Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) (stating that first-filed rule should be applied where there is "substantial overlap" between two suits); *TPM Holdings Inc. v. Intra-Gold Indus., Inc.*, 91 F.3d 1, 4 (1st Cir. 1996) ("[W]here the overlap between two suits is less than complete, the judgment is made case by case, based on such factors as the extent of the overlap, the likelihood of conflict, the comparative advantage and the interest of each forum in resolving the dispute."); *Manufacturers Hanover Trust Co. v. Palmer Corp.*, 798 F. Supp. 161, (S.D.N.Y. 1992) (stating that application of first-filed rule is appropriate where "cases [are] related, not identical," and applying rule where both actions arose from same underlying transaction). Clearly, limiting application of the first-filed rule to cases posing identical issues would not serve the rationale behind the rule — "to avoid burdening the federal judiciary and

to prevent the judicial embarrassment of conflicting judgments." *EEOC*, 850 F.2d at 977.

Although "[c]ourts must be presented with exceptional circumstances before exercising their discretion to depart from the first-filed rule," EEOC, 850 F.2d at 979, the rule should not be applied mechanically. *See id.* at 976. We have noted that evidence of bad faith or forum shopping may serve as a basis for departing from the rule. *See id.* Also, the rule has been rejected when the second-filed action has developed further than the first action, and when the first-filed suit was filed in one forum in anticipation of the second suit being filed in a second, less favorable forum. *See id.* at 976-77. Due to the discretionary nature of the first-filed rule, we review the New Jersey District Court's application of the rule for abuse of discretion. *See id.* at 972.

Here, the parties do not dispute that AT&T's New Jersey District action was filed first in time or that the parties to the suits are the same. Rather, JMC contends that the New Jersey District Court should not have applied the first-filed rule because (i) "the federal courts are reluctant to find the first-filed rule enforceable against an antitrust plaintiff"; (ii) the issues in the actions are not identical, and (ii) AT&T's New Jersey District action was filed to preempt JMC's suit in the Eastern District of New York. *See Mandamus Petition*, at 8. As discussed below, the New Jersey District Court did not abuse its discretion in maintaining jurisdiction and enjoining prosecution of JMC's action in the Eastern District of New York based on application of the first-filed rule.

First, JMC's contention that federal courts are reluctant to enforce the first-filed rule against an antitrust plaintiff is

an exaggerated interpretation of limited case law. The only case cited by JMC for this proposition, *Columbia Pictures Indus., Inc. v. Schneider*, 435 F. Supp. 742 (S.D.N.Y. 1977), was decided on a host of equitable considerations. *See id.* at 751. While "the desirability of according plaintiffs in anti-trust actions their choice of forum" was mentioned as a factor, the Court explicitly ruled based on the "totality of the circumstances." *Id.* Its rationale for according some weight to this factor was limited to its finding that "Congress intends [antitrust plaintiffs] to have a broader than usual choice of venue." *Id.* at 748 (citation omitted). In this context, we believe that even if the nature of JMC's claims in the Eastern District of New York action should be considered as a factor in the first-filed analysis, application of the first-filed rule is not materially different when the second-filed action includes antitrust claims.

Second, the fact that the issues in the actions are not identical does not prevent application of the first-filed rule. As set forth above, the first-filed rule may be applied when overlap exists between the actions — but the extent of required overlap is a matter of judicial discretion. At bottom, there must be enough overlap between the actions that allowing them to proceed simultaneously would lead to duplicative proceedings and would raise the specter of conflicting judgments. To repeat the admission by JMC already noted:

> The facts underlying both the AT&T and JMC complaints arise out of, inter alia, the contract signed by the parties, the conduct of the parties vis á vis that contract, and the general market conditions. . . .

> There is no sensible reason for litigating these two complaints in separate forums. They should be tried together.

Because the two actions arise out of the same course of conduct and involve the same documents, application of the first-filed rule will likely avoid duplicative judicial work and quite possibly inconsistent judgments.

Finally, the New Jersey District Court made a number of findings that further supported the exercise of its discretion to enjoin the action in the Eastern District of New York: (i) the record did not reveal that the Eastern District action was developing more quickly than the New Jersey District action; and (ii) AT&T's decision to file in the New Jersey District was not motivated solely by forum shopping. While the New Jersey District Court considered JMC's allocation that AT&T merely filed in New Jersey to preempt JMC's choice of forum, the Court found that this factor was not sufficient to warrant an exception to the first-filed rule. Even if this Court would disagree with the New Jersey District Court's finding and conclude that AT&T did file its New Jersey District action to preempt JMC's Eastern District of New York action, this alone is not sufficient to outweigh the aforementioned factors.

In sum, the record provides ample support for the New Jersey District Court's application of the first-filed rule. Accordingly, it did not abuse its discretion in enjoining JMC's action in the Eastern District of New York.

B.

In its January 21 Order, the New Jersey District Court denied JMC's motion to transfer for improper venue under 28 U.S.C. § 1406(a).[2] JMC argues that venue was improper under § 1406(a) due to the presence of the forum selection provision in the Agreement, which required that JMC bring all actions in New York. The New Jersey District Court found that because a forum selection clause does not render venue improper, *see Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877-78 (3d Cir. 1995) (finding that because forum selection clause does not render venue improper, motion to transfer to designated forum should be made under § 1404(a) rather than § 1406(a)), transfer under § 1406(a) is the incorrect avenue. We agree for the reasons set forth in *Jumara*.

IV.

For the foregoing reasons, this Court dismisses JMC's appeal and denies its Petition for Writ of Mandamus.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

/s/ Thomas L. Ambro
Circuit Judge

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2. 28 U.S.C. § 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it is in the interest of justice, transfer such case to any district or division in which it could have been brought."

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-5247

IN RE:
JMC TELECOM, LLC,

Petitioner

No. 00-5279

AT&T CORP.

v.

JMC TELECOM, LLC

Appellant

On Petition for a Writ of Mandamus to and
on Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 99-cv-02578)
District Judge: Honorable Mary Little Cooper.

Argued August 11, 2000

Before: BARRY, AMBRO, and GREENBERG,
Circuit Judges

Appendix A

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and argued on August 11, 2000.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the appeal is hereby dismissed and the Petition for Writ of Mandamus is hereby denied. Costs are taxed against petitioner-appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

DATED: January 23, 2001

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED MARCH 17, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 99-2578 (MLC)

AT&T CORP.,

Plaintiff,

v.

JMC TELECOM, LLC,

Defendant.

MEMORANDUM AND ORDER

This matter comes before the Court on the following motions: (1) a motion by defendant for reconsideration of our Memorandum and Order filed January 21, 2000 (the "January 21 Opinion"); (2) a motion by defendant for certification for immediate appeal of our January 21 Opinion; (3) a motion by defendant to dismiss for lack of personal jurisdiction; and (4) a motion by plaintiff to enjoin defendant from prosecuting its action pending in the United States District Court for the Eastern District of New York. For the reasons stated, defendant's motions are denied and plaintiff's motion is granted.

Appendix B

BACKGROUND

Plaintiff AT&T Corp. ("AT&T") and defendant JMC Telecom ("JMC") entered into an agreement whereby AT&T would provide its Commercial Prepaid Card Service to JMC, and JMC would sell prepaid phone card services to end users. (Compl. ¶ 8.) The parties executed three documents: the Contract Tariff Order Form ("CTOF"), the Professional Services Agreement ("PSA") and the Addendum. The CTOF, Contract Tariff, and AT&T FCC Tariff No. 1 set forth the applicable rates, terms and conditions governing the provision of the Commercial Prepaid Card Service to JMC. (Compl. ¶ 12, Exs. 1, 2.) The Contract Tariff also established a minimal annual revenue commitment to be satisfied by JMC through its purchases of the Commercial Prepaid Card Service. (*Id.*)

The Addendum stated that if a business downturn beyond JMC's control resulted in JMC's inability to meet its revenue or volume commitments, the parties would cooperate in efforts to develop a mutually agreeable solution, which could include, *inter alia*, a change in rates. (Aff. of Jean Marie Cabri dated 12-6-99 ("Cabri Aff."), Ex. 1.) The PSA committed JMC to design and print prepaid phone cards and for AT&T to fund in part the production of the cards. (*Id.* ¶ 7, Ex. 1 arts. 1, 3.)

JMC subsequently developed concerns with the Commercial Prepaid Card Service provided by AT&T. (*Id.* ¶¶ 8-10.) Representatives of JMC met unsuccessfully with representatives of AT&T to resolve the dispute. (Cabri Aff. ¶¶ 10-11.) AT&T filed this action on June 4, 1999,

alleging that JMC breached the Contract Tariff by incurring more than $2.3 million in AT&T Commercial Prepaid Card Services while paying for less than $1.9 million. (Compl. ¶ 16.) JMC filed a complaint in the United States District Court for the Eastern District of New York on June 29, 1999, asserting, *inter alia*, breach of contract and various antitrust violations. (Decl. of Russell F. Brasso dated 2-1-99 ("Brasso Decl."), Ex. 2.)

JMC filed a motion to dismiss for improper venue or in the alternative, to transfer for improper venue pursuant to 28 U.S.C. § 1406(a), on December 7, 1999. JMC argued that venue is improper in this District pursuant to 28 U.S.C. § 1406 because of the forum selection clause contained in the PSA. (Def.'s Br. in Supp. of Mot. to Dismiss for Improper Venue at 4.) The Court followed clear Third Circuit precedent and found that a forum selection clause does not render venue improper. (Mem. & Order dated 1-21-00 ("Op.") at 4) (citing *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877-78 & n.3 (3d Cir. 1995)). JMC did not set forth any other basis for why venue in this District would be improper. Accordingly, the Court denied JMC's motion to dismiss for improper venue pursuant to 28 U.S.C. § 1406. (Op. at 5.)

Despite JMC's identification of its motion as one to dismiss or transfer pursuant to 28 U.S.C. § 1406, and its counsel's disavowal at oral argument of any reliance on 28 U.S.C. § 1404, the Court liberally proceeded to address whether a transfer of venue was warranted pursuant to § 1404(a). (*Id.* at 5 (noting that under *Jumara*, the presence of a forum selection clause influences only whether a court should transfer venue, where venue is proper, under § 1404).)

Appendix B

The Court first addressed whether the forum selection clause applied to AT&T's Complaint, therefore deserving consideration in our § 1404 analysis. (*Id.* at 6-7.) We found that: (1) JMC had not proven that the forum selection clause, which appears in the PSA, governed AT&T's Complaint which alleges violations of the Contract Tariff, (*id.* at 7-8), and (2) even if the forum selection clause bound JMC, the clause did not apply to AT&T by its very terms. (*Id.* at 11.) We then weighed the various § 1404 factors and found that JMC had not met its burden of showing that transfer would be warranted pursuant to § 1404. (*Id.* at 12.) We also noted that the first-filed rule supported our retaining jurisdiction. (*Id.* n.4.) The Court therefore denied JMC's motion to dismiss or transfer for improper venue.

JMC has filed the following motions: (1) for reconsideration of our January 21 Opinion; (2) for certification for immediate appeal of our January 21 Opinion; and (3) to dismiss for lack of personal jurisdiction. AT&T has filed a motion to enjoin JMC from prosecuting its action pending in the United States District Court for the Eastern District of New York. The Court heard oral argument on these motions on March 8, 2000. We will address each motion seriatim.

DISCUSSION

I. JMC's Motion for Reconsideration

Loc. Civ. R. 7.1(g) is entitled "Motions for Reargument." Because New Jersey district courts have used the terms "reargument" and "reconsideration" interchangeably, Loc.

Appendix B

Civ. R. 7.1(g) has been found to govern both motions for reargument and motions for reconsideration. *See, e.g., In re Consolidated Parlodel Litig.*, 22 F. Supp. 2d 320, 329 (D.N.J. 1999). Local Rule 7.1(g) provides in pertinent part:

> A motion for reargument shall be served and filed within 10 days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge. There shall be served with the notice a brief setting forth concisely the matters or controlling decisions which counsel believes the Judge or Magistrate Judge has overlooked.

Id.

It is well settled that a motion for reconsideration is "an extremely limited procedural vehicle." *Resorts Int'l, Inc. v. Greate Bay Hotel and Casino, Inc.*, 830 F. Supp. 826, 831 (D.N.J. 1992). Motions for reconsideration will not be granted where the only apparent purpose for filing such a motion is to assert the reasons why the moving party disagrees with the district court's decision. *See Hatco Corp. v. W.R. Grace & Co. — Conn.*, 849 F. Supp. 987, 990 (D.N.J. 1994) (quotations omitted); *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 163 (D.N.J. 1988). Further, Rule 7.1(g) does not "contemplate a Court looking to matters which were not originally presented, but which have since been provided for consideration." *Florham Park Chevron*, 680 F. Supp. at 162 (citation omitted).

We find that JMC has not set forth a dispositive matter that the Court overlooked. JMC argues that the Court

overlooked the following statement by Jean Marie Cabri, the CEO of JMC: "I was told by AT&T representatives present that the three documents represented the entire agreement between JMC and AT&T." (Pl.'s Br. in Supp. of Mot. for Recons. at 2 (citing Cabri. Aff. ¶ 4).) While the Court did not cite this statement, we did not overlook it. We found that JMC did not prove that the forum selection clause applied to AT&T's Complaint based on our interpretation of the language of the PSA, the CTOF and the Addendum. (*See* Op. at 7-8.) Cabri's statement does not alter our decision.

JMC's motion for reconsideration fails for a more fundamental reason. In our prior Opinion, the Court liberally interpreted JMC's motion as one to transfer pursuant to 28 U.S.C. § 1404(a) despite (1) JMC's identification of its motion as one to dismiss or transfer pursuant to 28 U.S.C. § 1406, (2) its counsel's disavowal at oral argument on January 19, 2000 of any reliance on 28 U.S.C. § 1404, and (3) the failure by JMC to address in its briefs the factors applied by courts to determine whether transfer is proper pursuant to § 1404(a). (Op. at 5 & n.1.) The Court chose to interpret the motion pursuant to § 1404 because JMC's motion to dismiss or transfer pursuant to § 1406 was clearly without merit in light of JMC's failure to argue that venue was improper apart from the inclusion of the forum selection clause and the Third Circuit's holding in *Jumara* that a forum selection clause has no bearing on whether venue was proper.

JMC continues to argue that its prior motion was based on 28 U.S.C. § 1406. (*See* Pl.'s Reply Br. in Supp. of Mot. to Dismiss for Lack of Pers. Juris. at 1 (noting that the basis for the first motion was § 1406(a)); Pl.'s Counsel at oral

argument ("The original motion was a 1406. The Court in its decision decided to use it as a 1404, which was not a 1406.").) In light of JMC's continued assertion that the motion was made pursuant to § 1406, the Court will no longer construe the motion as made pursuant to § 1404. Accordingly, JMC's motion is clearly without merit because of its failure to set forth evidence that venue was improper. *See* 28 U.S.C. § 1406; *Jumara*, 55 F.3d at 878-79 (determining whether venue was proper without regard to the forum selection clause).

II. JMC' Motion for Certification for Immediate Appeal

JMC moves for certification for immediate appeal of our January 21 Opinion. "The Interlocutory Appeals Act, § 28 U.S.C. 1292, provides a means of appealing from interlocutory orders that are otherwise non-appealable." *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 830 F. Supp. 1549, 1554 (D.N.J. 1993) (hereinafter "PIRG"). Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order . . .

Id.

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The statute sets forth three items which must be satisfied before a court may certify a question for appeal: (1) the courts' order must involve a "controlling question of law"; (2) it must offer "substantial ground for difference of opinion" as to its accurateness; and (3) its immediate appeal must "materially advance the ultimate termination of the litigation." *PIRG*, 830 F. Supp. at 1554.

A question is controlling if its incorrect disposition would require reversal of the final judgment. *Hulmes v. Honda Motor Comp.*, 936 F. Supp. 195, 208 (D.N.J. 1996) (citing *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974)). JMC identifies the following as the controlling question of law: "Whether a one-way forum-selection clause imposed by a giant corporation on a contracting party because it possesses disproportionate bargaining power violates public policy and warrants dismissal under 28 U.S.C. § 1406(a) and/or transfer to the United States Eastern Court?" (Def.'s Br. in Supp. of Mot. for Certif. at 7.)

In our prior Opinion, the Court found that the forum selection clause, which appeared only in the PSA, did not apply to AT&T's Complaint, which alleges violations of the Contract Tariff. (Op. at 8.) We then ruled that even if the clause applied to AT&T's Complaint, the clause did not bind AT&T by its terms and a nonmutual forum selection clause was not per se invalid. (*Id.* at 11.) JMC argues that our finding that a nonmutual forum selection clause was valid constitutes a controlling question of law. (Def.'s Br. in Supp. of Mot. for Certif. at 7.) However, even if the Third Circuit ruled in JMC's favor, the decision would not require reversal in light of our finding that the forum selection clause, whether

nonmutual or not, does not apply to the allegations in AT&T's Complaint. Accordingly, the Court will deny JMC's motion for certification for immediate appeal of our January 21 Opinion.[1]

III. *JMC's Motion to Dismiss for Lack of Personal Jurisdiction*

JMC argues that this Court lacks personal jurisdiction over JMC. (Pl.'s Br. in Supp. of Mot. to Dismiss for Lack of Pers. Juris. at 2-3.) AT&T argues that JMC waived its defense of lack of personal jurisdiction by not including said defense in its prior motion to dismiss for improper venue. (Def.'s. Br. in Opp'n to Pl.'s Mot. to Dismiss for Lack of Personal Jurisdiction at 4.)

Federal Rule of Civil Procedure 12 provides in pertinent part:

> (g) Consolidation of Defenses in Motion.
>
> A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, the party

1. Our finding that JMC did not set forth a controlling issue of law prevents our having to address whether there is a substantial ground for difference of opinion on the issue raised by JMC or whether the immediate resolution of the issue will materially advance the ultimate termination of the litigation.

> shall not thereafter make a motion based on the defense or objection so omitted . . .
>
> (h) Waiver or Preservation of Certain Defenses.
>
> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g) . . .

Fed. R. Civ. P. 12(g), (h). The purpose of these rules is to eliminate the presentation of the specified defenses in a piecemeal fashion. *Pilgrim Badge & Label Corp. v. Barrios*, 857 F.2d 1, 3 (5th Cir. 1988)

JMC's prior motion was clearly a motion to dismiss or transfer for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). (*See* Not. of Mot. at 2 ("Defendant [JMC] will move the Court pursuant to Federal Rule of Civil Procedure 12(b)(3) for an order dismissing this action on the ground that the venue in this action is improper . . . and/or, in the alternative, to transfer this action to the Eastern District of New York pursuant to 28 U.S.C. § 1406(a).").)

JMC's arguments as to why the Court should not find a waiver are without merit. JMC argues that its prior motion was actually brought pursuant to Rule 12(b)(6). (Pl.'s Reply Br. in Supp. of Mot. to Dismiss for Lack of Personal Jurisdiction at 2.) However, JMC would still be obligated to

raise the defense of lack of personal jurisdiction as part of a 12(b)(6) motion.[2]

Accordingly, we find that JMC waived its defense of lack of personal jurisdiction by failing to raise the defense in its motion to dismiss for improper venue.[3] Fed. R. Civ. P. 12(g), (h); *Pilgrim Badge*, 857 F.2d at 3 (finding that defendant waived the defense of lack of personal jurisdiction by failing to raise the defense in his motion to dismiss for improper venue).

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2. JMC's citation to *Telebrands Direct Response Corp. v. Ovation Comm.*, 802 F. Supp. 1169 (D.N.J. 1992), is misplaced. In Telebrands, the defendant cross-moved for preliminary injunctive relief without moving to dismiss for improper venue and filed an answer and counterclaim on the same day. *Id.* at 1174. The defendant then moved to dismiss for improper venue before the court held a hearing on the cross-motion for preliminary injunctive relief. *Id.* at 1172. The court held that the defendant did not waive its objection to venue by mounting a "vigorous defense" to the plaintiff's lawsuit. *Id.* at 1174.

We find that *Telbrands* can be distinguished because the defendant there did not file a motion pursuant to Rule 12(b) before filing the motion to dismiss for improper venue. *See* Fed. R. Civ. P. 12(g), (h).

3. We will decline to determine whether the Court has personal jurisdiction over JMC in light of our finding that JMC waived its defense of lack of personal jurisdiction. We note that AT&T has set forth evidence in support of its argument that the Court has jurisdiction. (*See* Certif. of Gerard A. Lewis, Jr. dated 2-24-00 ¶ 2 (noting that JMC representatives traveled to New Jersey twice in 1998 to discuss with AT&T a possible business arrangement).)

Appendix B

IV. *AT&T's Motion To Enjoin JMC from Prosecuting Its Action*

AT&T moves to enjoin JMC from prosecuting its action pending in the United States District Court for the Eastern District of New York (the "New York action"). AT&T argues that the Court should enjoin JMC pursuant to the first-filed rule. (Pl.'s Br. in Supp. of Mot. for an Order Stay. Def. at 7.) JMC argues that the first-filed rule is not a jurisdictional bar and should not be followed because, *inter alia*, JMC's complaint in the New York action raises significantly different issues from the allegations contained in AT&T's Complaint. (Def.'s Br. in Opp'n to Mot. for an Order Stay. Def. at 8.)

Courts apply the first-filed rule where parties have instituted competing or parallel litigation in separate federal courts. Generally, the rule states that the court initially having the controversy before it should retain jurisdiction over the entire case and decide it. *EEOC v. University of Pa.*, 850 F.2d 969, 971 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 182 (1990). It has been recognized that " 'it is the policy of our Circuit Court that absent unusual circumstances,' the first-filed rule applies in cases of concurrent federal jurisdiction." *Id.* (quoting *Berkshire Intern. Corp. v. Marquez*, 69 F.R.D. 583, 586 (E.D. Pa. 1976)).

The rule gives the district court the power to enjoin the subsequent prosecutions of proceedings involving the same parties and the same issues already before the district court. *Id.* at 971-72. The justification for a court to employ its injunctive power is to prevent vexatious litigation, which

can be demonstrated by a showing that the two suits present the likelihood of duplicating judicial work and exposing one or more of the parties to inconsistent results. *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 930 (3d Cir. 1941); *Specialty Ins. Agency, Inc. v. Walter Kaye Assoc., Inc.*, No. 89-1708, 1989 WL 65618, at *4 (June 7, 1989).

The purpose of the first-filed rule is to promote sound judicial administration and comity among courts in the federal system. *University of Pa.*, 850 F.2d at 971. Nevertheless, the rule "is not a mandate directing wooden application of the rule without regard to rare or extraordinary circumstances, inequitable conduct, bad faith or forum shopping." *Id.* at 972. Thus, the Third Circuit has recognized that "no precise rule governs relations between federal district courts possessing jurisdiction, but the general principle is to avoid duplicative litigation." *Id.* (citing *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976)).

Extraordinary circumstances warranting departure from the rule include when the plaintiff in the first action is solely motivated by forum shopping in the choice of forum for the first suit. *William S. Gluckin & Co., Inc. v. International Playtex Corp.*, 407 F.2d 177, 178 (2d Cir. 1969); *see also University of Pa.*, 850 F.2d at 972 (noting that the defendant knew that Third Circuit law precluded a finding in its favor and filed suit in another forum to avoid adverse law). Another reason justifying departure from the rule exists when the second-filed case has developed more rapidly than the first. *Id.* at 976-77. An additional factor is whether the party instituting the first action intended to preempt a later suit by

its adversary. *See, e.g., Serco Serv. Co. v. Kelley Co.*, 51 F.3d 1037, 1038 (Fed. Cir. 1995). The decision to apply the first-filed rule and dismiss a subsequent suit rests within the discretion of the trial court. *University of Pa.*, 850 F.2d at 972 (citing *Crosley Corp.*, 130 F.2d at 475-76).

The Court will first address whether the basic requirements for the application of the first-filed rule have been met. It is undisputed that (1) AT&T's Complaint was filed on June 4, 1999 and JMC's Complaint was filed on June 29, 1999, and (2) the parties to the two complaints are the same. JMC argues that the issues in the two complaints, however, are significantly different. (Def.'s Br. in Opp'n to Mot. for an Order Staying Def. at 8.)

We note that the first-filed rule does not require that the issues in the two cases be identical. *See Save Power, Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950-51 (5th Cir. 1997) (stating that the crucial inquiry is one of "substantial overlap"); *TPM Holdings, Inc. v. Intra-Gold Indus., Inc.*, 91 F.3d 1, 4 (1st Cir. 1996) ("Where the overlap between two suits is less than complete, the judgment is made case by case, based on such factors as the extent of overlap, the likelihood of conflict, the comparative advantage and the interests of each forum in resolving the dispute"); *Meeropol v. Nizer*, 505 F.2d 232, 235 (2d Cir. 1974) ("Where an action is brought in one federal district court and a later action embracing the same issue is brought in another federal court, the first court has jurisdiction to enjoin the prosecution of the second action."); *Manufacturers Hanover Trust Comp. v. Palmer Corp.*, 798 F. Supp. 161, 167 (S.D.N.Y. 1992) (stating that the cases must be related, not identical).

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The Court has examined both AT&T's Complaint and JMC's complaint in the New York action and conclude that they are sufficiently related for the first-filed rule to apply. AT&T alleges that JMC breached the Contract Tariff by incurring more than $2.3 million in AT&T Commercial Prepaid Card Services while paying for less than $1.9 million. (Compl. ¶¶ 16, 22.) JMC alleges that AT&T (1) breached the contract entered into between AT&T and JMC by failing to provide the services promised, and (2) committed fraud in its dealings with JMC. (Brasso Decl., Ex. 2: ¶¶ 18, 22, 23.) These causes of action directly relate to AT&T's allegation that JMC has not paid for the services purchased from AT&T.

JMC also alleges that AT&T has committed antitrust violations by, *inter alia*, restraining JMC from selling to various customers and providing preferential rates to competitors of JMC (*Id.* ¶¶ 19, 20, 24.) JMC argues that these claims are sufficiently different from AT&T's claims to prevent the application of the first-filed rule. (Def.'s Br. in Opp'n to Mot. for an Order Staying Def. at 8.)

After examining the two complaints, the Court finds that, while the issues raised are not identical, there is sufficient overlap for the Court in its discretion to apply the first-filed rule. *See Save Power, Ltd.*, 121 F.3d at 950-51. The Court also finds that the existence of the two suits presents the likelihood of duplicating judicial work and exposing one or more of the parties to inconsistent results. *See Crosley Corp.*, 122 F.2d at 930. Accordingly, the basic requirements for applying the first-filed rule appear to be met.

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The Court also finds that none of the circumstances warranting departure from the first-filed rule apply in this matter. The record does not reveal that the New York action has developed more rapidly than this one. *See University of Pa.*, 850 F.2d at 976-77. AT&T's decision to file was not motivated solely by forum shopping. *See William S. Gluckin & Co.*, 407 F.2d at 178. Both AT&T's principal place of business and some of the events related to these disputes occurred in New Jersey. *See Capitol Records, Inc. v. Optical Recording Corp.*, 810 F. Supp. 1350, 1353-54 (S.D.N.Y. 1992) (finding that forum shopping was not sole basis for plaintiff's filing in New York where plaintiff's principal place of business was in New York and the events that led to the declaratory judgment action included negotiations between the parties in New York).

The fact that AT&T may have realized that JMC was considering bringing a lawsuit warrants scrutiny. *See Northwest Air. v. American Air.*, 989 F.2d 1002, 1007 (8th Cir. 1993) (noting that awareness by party which filed first that other party was considering suit raised red flag). We might be persuaded that this factor would constitute a compelling circumstance if AT&T had filed for declaratory judgment in this action. *See United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir. 1990) (noting that the party against which the first-filed declaratory judgment action was filed, whose second-filed action sought damages, could be considered the "true plaintiff"). In the instant matter, however, AT&T seeks damages premised on JMC's alleged failure to pay for services provided. We therefore conclude that AT&T's awareness of JMC's contemplation of filing suit does not justify our refraining from applying the first-filed rule.

Accordingly, the Court concludes that the first-filed rule should be applied to this matter. We will therefore grant AT&T's motion to stay JMC from prosecuting its action in the United States District Court for the Eastern District of New York.[4]

IT IS THEREFORE on this 17th day of March, 2000, **ORDERED** as follows:

(1) defendant's motion for reconsideration (no. 18-1 on the docket) be and hereby is **DENIED**;

(2) defendant's motion for certification for immediate appeal of our January 21, 2000 Memorandum and Order (no. 19-1 on the docket) be and hereby is **DENIED**;

(3) defendant's motion to dismiss for lack of jurisdiction (no. 21-1 on the docket) be and hereby is **DENIED**;

(4) plaintiff's motion to stay defendants from prosecuting its action in the United States District Court for the Eastern District of New York be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that defendant is **ENJOINED** from prosecuting its action in the United States District Court for the Eastern District of New York.

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

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4. We note that the grant or denial of an injunction is generally appealable. *See* 28 U.S.C. § 1292(a)(1).

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED JANUARY 21, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 99-2578 (MLC)

AT&T CORP.,

Plaintiff,

v.

JMC TELECOM, LLC,

Defendant.

MEMORANDUM AND ORDER

This matter comes before the Court on a motion by defendant JMC Telecom, LLC ("JMC") to dismiss or in the alternative, to transfer for improper venue pursuant to 28 U.S.C. § 1406. For the reasons stated, the motion is denied.

BACKGROUND

Plaintiff AT&T Corp. ("AT&T") and defendant JMC entered into an agreement whereby AT&T would provide its Commercial Prepaid Card Service to JMC, and JMC would sell prepaid phone card services to end users. (Compl.

¶ 8; Def.'s Br. in Supp. at 2.) The parties executed three documents: the Contract Tariff Order Form ("CTOF") , the Professional Services Agreement ("PSA") and the Addendum. AT&T filed the CTOF with the Federal Communications Commission ("FCC"), which permitted the Contract Tariff to become effective. (Compl. ¶ 10.) The CTOF, Contract Tariff, and AT&T FCC Tariff No. 1 set forth the applicable rates, terms and conditions governing the provision of the Commercial Prepaid Card Service to JMC. (Compl. ¶ 12, Exs. 1, 2.) The Contract Tariff also established a minimal annual revenue commitment to be satisfied by JMC through its purchases of the Commercial Prepaid Card Service. (*Id.*)

The Addendum stated that if a business downturn beyond JMC's control resulted in JMC's inability to meet its revenue or volume commitments, the parties would cooperate in efforts to develop a mutually agreeable solution, which could include, *inter alia*, a change in rates. (Aff. of Jean Marie Cabri dated 12-6-99 ("Cabri Aff."), Ex. 1.) The PSA committed JMC to design and print prepaid phone cards and for AT&T to fund in part the production of the cards. (Id. ¶ 7, Ex. 1 arts. 1, 3.) The term of both the Contract Tariff and the PSA was three years. (Compl., Ex. 2; Cabri Aff., Ex. 1.) The CTOF, Addendum, and PSA were all executed by JMC on August 25, 1998 and by AT&T on September 11, 1998.

JMC subsequently developed concerns with the quality of the Commercial Prepaid Card Service provided by AT&T. (Def.'s Br. in Supp. at 3.) JMC alleges that its prepaid cards were not competitive with other prepaid cards on the market.

(*Id.*) Representatives of JMC met unsuccessfully with representatives of AT&T to resolve the dispute. (Cabri Aff. ¶¶ 10-11.) AT&T filed this action on June 4, 1999, alleging that JMC breached the Contract Tariff by incurring more than $2.3 million in AT&T Commercial Prepaid Card Services while paying for less than $1.9 million. (Compl. ¶ 16.) JMC filed a Complaint in the United States District Court for the Eastern District of New York on June 29, 1999, asserting, *inter alia*, breach of contract and various antitrust violations. (Decl. of Russell F. Brasso dated 10-15-99 ("Brasso Decl."), Ex. 2.)

JMC filed a motion to dismiss this action for improper venue or in the alternative, to transfer for improper venue pursuant to 28 U.S.C. § 1406(a), on December 7, 1999. JMC argues that the presence of a forum selection clause renders venue improper in this district. (Def.'s Br. in Supp. at 4.) The forum selection clause, which appears in the PSA, states as follows:

> The construction, interpretation and performance of this Agreement and all transactions under it shall be governed by the laws of the State of New York excluding its choice of law rules. Contractor [JMC] agrees not to file any action, claim, suit or demand, including any claim for injunctive, legal or other equitable relief against Company [AT&T], in any court of any jurisdiction apart from the state or federal court, located in New York.

(Brasso Decl., Ex. 3: PSA art. 26) (bracketed material added.)

Appendix C

AT&T argues that the forum selection clause is confined to the PSA and therefore does not govern AT&T's Complaint, which asserts violations of the Contract Tariff. (Pl.'s Br. in Opp'n at 6.) JMC responds that the forum selection clause applies to the entire agreement between the parties. (Def.'s Reply Br. at 2.) In particular, JMC asserts that the essence of the overall agreement was that JMC would design the prepaid calling cards, purchase the calling card services from AT&T and then sell the cards to retail customers. (*Id.* at 2.) According to JMC, the documents created a single agreement because the prepaid cards would be worthless without the underlying service and vice versa. (*Id.* at 2-3; Cabri Aff. ¶ 7.)

AT&T also argues that the forum selection clause binds JMC but not AT&T. (Pl.'s Br. in Opp'n at 6.) JMC concedes that the language of the forum selection clause appears to limit only the rights of JMC. (Def.'s Reply Br. at 3.) JMC argues, however, that such a clause would violate public policy and that the clause should therefore be applied to AT&T as well. (*Id.* at 4.) The Court heard oral argument on January 19, 2000.

DISCUSSION

JMC asserts that venue is improper in this district pursuant to 28 U.S.C. § 1406 because of a forum selection clause. (Def.'s Br. in Supp. at 4.) A forum selection clause does not, however, render venue improper. *See Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877-78 & n.3 (3d Cir. 1995). JMC does not appear to contend that venue is improper apart from the effect of the forum selection clause,

and it appears that venue is clearly proper in this district. *See* 28 U.S.C. § 1391(b). Accordingly, the Court will deny JMC's motion to dismiss for improper venue.

A court should consider the presence of a forum selection clause when determining whether a transfer of venue is warranted pursuant to 28 U.S.C. § 1404(a). *Jumara*, 55 F.3d at 878-79; *Salovaara v. Jackson Nat'l Life Ins. Co.*, 66 F. Supp. 2d 593, 604 (D.N.J. 1999).[1] Section 1404(a) provides: "[f]or the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The language of the statute suggests three factors that must be considered in transferring a case: (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interests of justice. *Sandvik, Inc. v. Continental Ins. Co.*, 724 F. Supp. 303, 306 (D.N.J. 1989) (citations omitted).

The moving party has the burden of establishing the need for transfer. *Jumara*, 55 F.3d at 879. The party seeking a transfer should support its motion with affidavits and other documentation. *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756-57 (3d Cir. 1973). The decision whether to transfer an action rests in the sound discretion of the trial court. *Id.*

Courts balance various private and public interests when deciding whether to transfer pursuant to § 1404(a). *Jumara*, 55 F.3d at 879. The private interests include: (1) plaintiff's

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1. JMC's counsel at oral argument disclaimed any reliance on § 1404. We will, however, proceed under § 1404, as required by *Jumara*.

forum preference; (2) defendant's preference; (3) whether the claim arose elsewhere; (4) convenience of the parties; (5) convenience of the witnesses to the extent that a witness may be unavailable for trial in one of the fora; (6) location of books and records to the extent they may be unavailable in one of the fora. *Id.* The public interests include: (1) enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious or inexpensive; (3) relative administrative difficulty in the two fora resulting from court congestion; (4) local interest in deciding local controversies at home; (5) public policies of the fora; and (6) familiarity of the trial judge with the applicable state law in diversity cases. *Id.* at 879-80.

"Within this framework, a forum selection clause is treated as a manifestation of the parties' preferences as to a convenient forum." *Id.* at 880. Courts normally defer to a plaintiff's choice of forum but "such deference is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue" by executing a valid forum selection clause. *Id.* A district court should not place dispositive weight upon a proper forum selection clause but the clause is entitled to substantial consideration. *Id.* (citations omitted); *Shore Slurry Seal, Inc. v. CMI Corp.*, 964 F. Supp. 152, 156 (D.N.J. 1997). We will now analyze whether the instant forum selection clause binds AT&T and therefore deserves substantial consideration in our § 1404 analysis.

AT&T argues that the forum selection clause is limited to the PSA and therefore does not govern AT&T's Complaint, which asserts violations of the Contract Tariff.

(Pl.'s Br. in Opp'n at 6.) We agree that JMC has not proven that the clause pertains to this action. The plain language of the PSA leads us to conclude that the forum selection clause pertains only to the PSA. The PSA provides as follows: "This agreement, including Exhibits A, B, C, and D attached hereto, as the same are in effect from time to time, constitutes the entire agreement between Contractor and Company with respect to the subject matter thereof." (Cabri Aff., Ex. 1 art. 36.) The PSA also states: "Company desires to retain Contractor to produce Graphics associated with prepaid cards co-branded with Company's and Contractor's names which are produced solely with PINS purchased by Contractor from Company *pursuant to a separate tariff or agreement*." (*Id.* "Recitals" (emphasis added).) The language of the PSA therefore does not lend support to JMC's argument that the documents at issue constituted one single agreement.

We note that neither the PSA nor the CTOF incorporates the other by reference. The other agreement, the Addendum, likewise does not incorporate the PSA. JMC attempts to link the PSA to the Addendum by alleging the following connection: (1) the Addendum states that the Contract Tariff Order Form may be revised if JMC is unable to meet its volume or revenue commitments, and (2) the PSA lists volume requirements related to the printing of the prepaid cards. (Statement of Joseph M. Alioto, Esq. at Oral Argument.) We note, however, that the Contract Tariff also sets out a minimal annual revenue commitment governing JMC's purchases of the Commercial Prepaid Card Service. (Compl., Ex. 2.) Therefore, we find for purposes of this motion, that the Addendum, which is entitled "Addendum to AT&T Custom offer Order," appears to be more closely

linked to the Contract Tariff than to the PSA.[2] Accordingly, we find that the forum selection clause, which appears only in the PSA, does not apply to the instant Complaint alleging violations of the Contract Tariff. *See Summers v. Guss*, 7 F. Supp. 2d 237, 240 (W.D.N.Y. 1998) (court did not apply forum selection clause contained in related sale agreement where the promissory note at issue did not contain a similar clause).

AT&T argues that, even if the forum selection clause applied to the current dispute, the clause binds only JMC. (Pl.'s Br. in Opp'n at 6.) JMC argues that such a clause would violate public policy and that the clause should therefore be applied to AT&T as well. (Def.'s Reply Br. at 4.) Our research has uncovered three cases addressing similar one-way clauses.

In *Karl Koch Erecting Co., Inc. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 657 (2d Cir. 1988), the forum selection clause limited one party ("Koch") to filing in the Supreme Court of the State of New York, County of New York. The other party (the "Center") brought suit in state court. *Id.* at 657. Koch filed in the United States District Court for the Southern District of New York and attempted to remove the state court action to federal court. *Id.* The United States Court of Appeals for the Second Circuit affirmed the district court's granting of the motion by the Center to dismiss Koch's action and to remand the Center's. *Id.*

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2. We note that all findings herein relate only to the instant motion.

Appendix C

The Second Circuit in *Koch* rejected Koch's argument that a forum selection clause which expressly limits only one party is unenforceable. (*Id.* at 659-60.) The clause at issue may not have lacked complete mutuality; the Second Circuit had "some sympathy" with the Center's argument that the clause, despite its language, required both parties to commence suit in state court. *Id.* at 660. The Second Circuit concluded, however, that even if the clause applied only to Koch, Koch had failed to show that the clause was invalid. *Id.* The court rejected comparisons to one-way arbitration clauses, which imposed arbitration on only one party and were invalid under New York law at the time. *Id.* (citing *Cored Panels, Inc. v. Menhard Commercial Corp.*, 72 A.D.2d 544 (N.Y. App. Div. 1979), abrogated by *Sablosky v. Edward S. Gordon, Inc.*, 535 N.E.2d 643, 646 (N.Y. 1989) ("Mutuality of remedy is not required in arbitration contracts.")).

In *Medoil Corp. v. Citicorp.*, 729 F. Supp. 1456, 1457 (S.D.N.Y. 1990), the forum selection clause required the account holder to bring suit against the contracting bank in Switzerland but allowed the bank to bring suit before any court of competent authority. The account holder filed suit against the bank in the United States District Court for the Southern District of New York. *Id.* The court granted the bank's motion to dismiss and stated that the "nonmutuality of the forum selection clause does not render it invalid." *Id.* at 1456-57 (citing *Karl Koch*, 838 F.2d at 659-60).

Finally, in *Standard Quimica de Venezuela v. Central Hispano International*, 989 F. Supp. 74, 75 (D.P.R. 1997), the forum selection clause required only one party (the

"plaintiffs") to consent to jurisdiction in Puerto Rico. The defendants argued that the action should proceed in Spain instead of Puerto Rico and filed a motion to dismiss on grounds of forum non conveniens. *Id.* The plaintiffs asked the court to apply the forum selection clause to the defendants. *Id.* The court rejected the plaintiffs' request because the defendants were not bound under the language of the clause. *Id.* at 78 ("Defendants, simply, are not bound by the clause's language and, hence, there is no mutuality."). The court found, however, that defendants did not satisfy the standards governing forum non conveniens and therefore denied their motion to dismiss. (*Id.* at 80.)

In light of this authority, we find that the nonmutual forum selection clause in the PSA is not per se invalid and should not be extended to bind AT&T.[3] The Court will consequently proceed with the analysis under § 1404 but without placing any weight on the forum selection clause.

We find that the relevant private factors identified by the Third Circuit in *Jumara* do not favor transfer to district court in New York. AT&T has chosen to file suit in New Jersey, and a plaintiff's choice of forum should not be lightly disturbed. *Jumara*, 55 F.3d at 880. A plaintiff's choice of forum is "entitled to greater deference" where a plaintiff has chosen its home forum, as in the instant matter. *Piper Aircraft v. Reyno*, 454 U.S. 235, 256 (1981). We also note that

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3. We note parenthetically that even were we to find that the forum selection clause was invalid, it does not follow that the Court would automatically enforce the clause against AT&T. In our view, the proper ruling would be to find that if the clause were invalid, it would bind neither AT&T nor JMC.

AT&T's claim did not arise in New York nor would New York be a more convenient forum for the parties or witnesses.

A weighing of the relevant public interests also supports denying JMC's motion to transfer. New Jersey has a recognized interest in this matter because AT&T is a local corporation. *See NCR Credit Corp. v. YE Seekers Horizon, Inc.*, 17 F. Supp. 2d 317, 322 (D.N.J. 1998) (noting that New Jersey has an interest in protecting a forum corporation from the alleged wrongful acts of a non-forum corporation). New York has no such interest as JMC is incorporated in California with its principal place of business in California as well. (Compl. ¶ 2.)

The Contract Tariff Order Form contains a choice of law provision requiring the application of New York law except to the extent that federal law applies. (Compl., Ex. 1.) A federal judge in New York therefore would be more familiar with any applicable state law. This factor weighs in favor of transfer but is substantially mitigated by the fact that the law to be applied in this action appears to be predominately federal. (*See, e.g.*, Compl. ¶ 21 (alleging breach of the tariff filed with the FCC; *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998) (noting that the violation of a tariff creates an action pursuant to the Federal Communications Act).

In light of our analysis of the relevant private and public factors, we find that JMC has not met its burden of showing

that transfer is warranted pursuant to 28 U.S.C. § 1404(a).[4] The Court will therefore deny plaintiff's motion.

IT IS THEREFORE on this 21st day of January, 2000, **ORDERED** that defendant's motion to dismiss or in the alternative, to transfer the case to the United States District Court for the Eastern District of New York (docket nos. 10-1 and 10-2) be and hereby is **DENIED**.

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

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4. The Court also finds that the first-filed rule supports our retaining jurisdiction over this matter. Courts apply the first-filed rule where parties have instituted competing or parallel litigation in separate federal courts. Generally, the rule states that the court initially having the controversy before it should retain jurisdiction over the entire case and decide it. *EEOC v. University of Pa.*, 850 F.2d 969, 971 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 182 (1990). It has been recognized that " 'it is the policy of our Circuit Court that absent unusual circumstances,' the first-filed rule applies in cases of concurrent federal jurisdiction." *Id.* (quoting *Berkshire Intern. Corp. v. Marquez*, 69 F.R.D. 583, 586 (E.D. Pa. 1976)). We note that AT&T filed this matter on June 4, 1999, and JMC filed its Complaint in the Eastern District of New York on June 29, 1999. (*See* Compl.; Brasso Decl., Ex. 2.) JMC has not proven the existence of unusual circumstances demonstrating that the doctrine should not be applied.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MARCH 13, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-5247

IN RE:
JMC TELECOM, LLC,

Petitioner

No. 00-5279

AT&T CORP.,

v.

JMC TELECOM, LLC

Appellant

Present: MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, AMBRO, FUENTES, and GREENBERG,*
Circuit Judges

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* As to panel rehearing only. Please note that Chief Judge Becker, and Judges Sloviter, McKee, and Rendell are recused. Please also note that at the time Judge Barry heard oral argument and participated in the Court's decision, she was not recused. She subsequently became recused.

Appendix D

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

s/ [illegible]
Circuit Judge

DATED: MAR 13 2001